SOUTH EAST ASIA INSURANCE BHD.

v.

NASIR IBRAHIM

SUPREME COURT, KUALA LUMPUR
ABDUL HAMID OMAR LP
GUNN CHIT TUAN SCJ
EDGAR JOSEPH JR SCJ
[SUPREME COURT CIVIL APPEAL NO. 02-196-91]
25 JUNE 1992

CONTRACT: *Third party indemnity - Whether the third party indemnity executed by respondent himself invalid on ground of past consideration - Performance bond signed by appellant was dated 9 August 1986 whereas indemnity signed by respondent dated 19 December 1986 - Distinction between Contract of Indemnity pursuant to s. 77 Contracts Act 1950 and Contract of Guarantee pursuant to s. 79 of Contracts Act 1950.*

CIVIL PROCEDURE: *Appeal - Whether notice of appeal was filed out of time.*

The respondent applied to the Senior Assistant Registrar to strike out the appellant's writ of summons and the statement of claim and the Senior Assistant Registrar refused the said application. The respondent's appeal to the High Court against the SAR's decision was allowed. On the same date, that is, 8 April 1991 the appellant's oral application for further arguments in open Court was not allowed as per the notes of proceedings recorded by the learned Judge which reads:

> **Mahkamah:** Rayuan dibenarkan dengan kos. Permohonan untuk membuat hujah lanjut di Mahkamah Terbuka tidak dibenarkan.

The learned Judge then issued a certificate dated 24 April 1991 pursuant to O. 56 r. 2(2) of the Rules of the High Court 1980 requiring no further arguments in open Court. The notice of appeal was filed by the appellant on 14 May 1991. The issue was whether the notice of appeal was filed out of time.

In so far as the appeal itself was concerned the only question of substance raised was whether the third party indemnity executed by the respondent himself was invalid on the ground of past consideration because the performance bond signed by the appellant was dated 9 August 1986 whereas the indemnity was dated 19 December 1986.

Held:

[1] As the learned Judge in the present case did not make any order on 8 April 1991 for the issue of a certificate requiring no further arguments and since the certificate was not issued until 24 April 1991 it was only on 24 April 1991 when the appellant knew of the issue of certificate in this case.

[2] The decision of the Federal Court as it then was in *Mae Bina Sdn. Bhd. v. Chee Kie Chong* should be distinguished because of the different facts and should not be applied in this case. The respondent's notice of motion was dismissed without any costs.

[3] The third party indemnity dated 19 December 1986 was a contract of indemnity and not a contract of guarantee so that s. 80 of the Contracts Act 1950 and cases concerning consideration for a guarantee referred to by the learned Judge need not be considered by the appellant.

[4] As it can be proved that there was consideration it can also be proved that the Third party indemnity was valid.

[5] The appeal was allowed and the order of the learned Judge which struck out the writ of summons and the statement of claim was set aside and the order of the Registrar dated 23 November 1990 restored.

[Appeal allowed with costs. Deposit ordered to be returned to the appellant.]

[**Bahasa Malaysia** Translation of Headnote]

KONTRAK: *Indemniti pihak ketiga - Samada indemniti pihak ketiga yang dilaksanakan oleh responden sendiri tidak sah di atas alasan balasan lampau - Bon pelaksanaan ditandatangani oleh perayu bertarikh 9 Ogos 1986 sedangkan indemniti ditandatangani oleh responden pada 19 Disember 1986 - Perbezaan di antara kontrak indemniti mengikut s. 77 Akta Kontrak 1950 dan Kontrak Gerenti mengikut s. 79 Akta Kontrak 1950.*

PROSEDUR SIVIL: *Rayuan - Samada notis rayuan difailkan di luar masa.*

Responden telah memohon kepada Penolong Pendaftar Kanan untuk membatalkan writ saman dan pernyataan tuntutan perayu dan Penolong Pendaftar Kanan telah menolak permohonan tersebut. Rayuan responden kepada Mahkamah Tinggi terhadap keputusan pendaftar dibenarkan. Pada tarikh yang sama iaitu 8 April 1991, permohonan lisan perayu untuk hujah lanjut dalam Mahkamah terbuka tidak dibenarkan seperti mana dicatatkan oleh Hakim Yang Arif dalam nota prosidingnya seperti berikut:

> **Mahkamah:** Rayuan dibenarkan dengan kos. Permohonan untuk membuat hujah lanjut di Mahkamah Terbuka tidak dibenarkan.

Hakim yang arif selepas itu telah mengeluarkan sijil tidak perlukan hujah-hujah selanjut dalam Mahkamah terbuka bertarikh 24 April 1991 mengikut Aturan 56 Kaedah 2(2) Kaedah-kaedah Mahkamah Tinggi. Notis rayuan telah difailkan oleh perayu pada 14 Mei 1991. Isu adalah sama ada notis rayuan tersebut telah difailkan di luar had masa.

Isu itu yang ditimbulkan dalam rayuan tersebut adalah sama ada indemniti pihak ketiga yang dilaksanakan sendiri oleh responden tidak sah di atas alasan balasan lampau oleh sebab bon pelaksanaan yang telah ditandatangani oleh perayu bertarikh 9 Ogos 1986 sedangkan indemniti bertarikh 19 Disember 1986.

Diputuskan:

[1] Oleh kerana Hakim Yang Arif dalam kes ini tidak mengeluarkan sebarang perintah untuk mengeluarkan sijil tidak perlukan hujah-hujah selanjut pada 8 April 1991 oleh sebab sijil tersebut tidak dikeluarkan sehingga 24 April 1991 maka pada tarikh 24 April 1991 sahajalah perayu sedar terhadap pengeluaran sijil tersebut dalam kes ini.

[2] Keputusan Mahkamah Persekutuan dahulu dalam kes *Mae Bina Sdn. Bhd. v. Chee Kie Chong* harus dibezakan oleh sebab terdapatnya fakta yang berlainan dan tidak harus dipakai dalam kes ini. Notis usul responden telah dibuang tanpa sebarang kos.

[3] Idemniti pihak ketiga bertarikh 19 Disember 1986 adalah sebuah kontrak idemniti dan bukan gerenti. Oleh itu s. 80 Akta Kontrak 1950 dan kes-kes mengenai balasan untuk gerenti yang dirujuk oleh Hakim Yang Arif tidak perlu dipertimbangkan.

[4] Oleh sebab dapat dibuktikan terdapat balasan maka juga dapat dibuktikan idemniti parti ketiga adalah sah.

[5] Rayuan tersebut dibenarkan dan perintah Hakim Yang Arif yang membatalkan writ saman dan pernyataan tuntutan diketepikan dan perintah Pendaftar bertarikh 23 November 1990 dipulihkan.

[Rayuan dibenarkan dengan kos. Deposit diperintahkan kembalikan kepada perayu.]

Cases referred to:
Mae Bina Sdn. Bhd. v. Chee Kie Chong [1991] 1 CLJ (Rep) 278 ***(dist)***
Chew Soon Tat v. Malaysia National Insurance Sdn. Bhd. [1977] 1 MLJ 241 ***(cons)***
Perbadanan Kemajuan Negeri Selangor v. Public Bank Bhd. [1980] 1 MLJ 172 ***(cit)***
Ram Narain v. Lt. Col. Hari Singh & Anor. [1964] AIR Rajasthan 76 ***(cit)***
Kali Charan v. Abdul Rahman [1918] AIR PC 226 ***(cit)***
Yeoman Credit Ltd. v. Latter [1961] 1 WLR 828 - 831 ***(foll)***
Western Credit Ltd. v. Alberry [1964] 2 All ER 938 ***(foll)***
Way v. Hearn [1862] 11CB (N.S) 774; 142 ER 1000 ***(foll)***
Goldshede v. Swan [1847] 1 Ex 154 ***(foll)***
Mumford v. Gething [1859] 7 CBNS 305 ***(foll)***
Lampleigh v. Braithwait [1615] Hob 105 ***(foll)***
Pao On v. Lau Yiu Long [1980] AC 614 ***(cons)***

Legislations referred to:
Contracts Act 1950 ss. 2(d), 77, 79, 80
Rules of the High Court 1980 O. 18 r. 19(1)(b), (c), (d), O. 56 r. 2(2)
Rules of the Supreme Court 1980 r. 56(a)

For the appellant - Chandran G. Nair (N. Pannirselvam with him); M/s. Thevin Chandran Siva Wong & Jamal
For the respondent - C. Soosay Nathan (Roseline Sheila Thomas with him); M/s. Abu Zahar Azmel & Partners

JUDGMENT

Gunn Chit Tuan SCJ:

Before we heard this appeal, one Nasir Ibrahim (hereinafter referred to as "the respondent") had filed a notice of motion dated 4 May 1992, to move the Court for an order that the appeal of South East Asia Insurance Bhd. (hereinafter referred to as "the appellant") to the Supreme Court, its notice of appeal dated 14 May 1991, and the memorandum of appeal dated 24 June 1991, be all struck out and that the costs of the application and the costs of the appeal be awarded to the respondent. The application was supported by an affidavit of Christie Marie Soosay Nathan, his Counsel, who stated that the appellant's appeal was against the decision of Justice Datuk Shaik Daud given on 8 April 1991, whereby the learned Judge had in chambers allowed an appeal by the respondent against the decision of the Senior Assistant Registrar who had dismissed the respondent's application to strike out the appellant's writ of summons and statement of claim in proceedings known as Kuala Lumpur High Court Civil Suit No. D1-22-2229-89.

After the learned Judge had pronounced his decision in chambers on 8 April 1991, an oral application for further arguments in open Court was made by the Counsel appearing for the appellant. That oral application for further arguments was not allowed as shown by the following two sentences of the relevant notes of proceedings recorded by the learned Judge:

> **Mahkamah:** Rayuan dibenarkan dengan kos. Permohonan untuk membuat hujah lanjut di Mahkamah Terbuka tidak dibenarkan.

A certificate pursuant to O. 56 r. 2(2) of the Rules of the High Court 1980, requiring no further arguments in open Court dated 24 April 1991, was thereafter issued by the learned Judge. A notice of appeal was filed by the appellant on 14 May 1991. But in a letter dated 6 June 1991, the Senior Assistant Registrar of the Supreme Court indicated '*inter alia*' that the said notice of appeal had been filed out of time. Mr. Nathan stated that the notice of appeal dated 14 May 1991, was filed out of time as the period of one month to file the said notice of appeal commenced from the date the appellant had notice that a certificate requiring no further arguments was to be issued, that is from 8 April 1991, when the learned Judge stated that he would not require further arguments.

Counsel referred us to our recent decision in *Mae Bina Sdn. Bhd. v. Chee Kie Chong* [1991] 1 CLJ (Rep) 278, in which case we had expressed the view that in the case of an appeal from an order made in chambers, r. 56(a) of the Rules of the Supreme Court, 1980, clearly provides that no appeal shall, except by leave of the full Court, be brought after the expiration of one month from the date when such order was pronounced **or** after the issue of the certificate of no further arguments whichever is the later **or** when the appellant first had notice of it. In that case, the appellant through its Counsel knew of the issue of the certificate when it was ordered by the Judge on 29 January 1989. In this case, however, we noticed that the learned Judge on 8 April l991, merely stated that the application for further arguments in open Court was not allowed. The difference is that the learned Judge in the present case did not make an order on 8 April 1991, for the issue of a certificate requiring no further arguments and we are of the view that he could have changed his mind before actually ordering the issue of a certificate, which was in fact not issued until 24 April 1991, when the appellant knew of the issue of the certificate in this case. We therefore considered that our decision in the *Mae Bina Sdn. Bhd.'s* case [1991] 1 CLJ (Rep) 278 should be distinguished because of the different facts and should not be applied in this case. In any case, even if the appellant was six days out of time in filing its appeal, we sitting as the full Court could and would grant leave for the appeal to be brought. We therefore dismissed the respondent's notice of motion without any costs.

In so far as this appeal itself was concerned, the only question of substance raised was whether the third party indemnity executed by the respondent himself was invalid on the ground of past consideration because the performance bond signed by the appellant was dated 9 August 1986, whereas the said indemnity was dated l9 December 1986. In allowing the appeal, the learned High Court Judge in his grounds of judgment referred to the case of *Chew Soon Tat v. Malaysia National Insurance Sdn. Bhd.* [1977] 1 MLJ 241, in which the former Federal Court decided '*inter alia*' that a guarantor would only be liable for debts or liabilities incurred after the date of the guarantee. Mr. Chandran Nair, Counsel for the appellant, submitted that the learned Judge had erred in referring to that case because the issue in that case was whether the appellant therein had accepted and/or undertook liabilities prior to 3 April 1972, when he signed the letter of guarantee.

Counsel also pointed out that the learned Judge had referred to the case of *Perbadanan Kemajuan Negeri Selangor v. Public Bank Bhd.* [1980] 1 MLJ 172, 175, wherein Mohd. Azmi J (as he then was), after referring to *Ram Narain v. Lt. Col. Hari Singh & Anor.* [1964] AIR Rajasthan 76, expressed the view that "a contract of guarantee executed afterwards without any consideration is void." Counsel pointed out that in the *Ram Narain's* case *(supra)*, the Indian Court had referred to the Privy Council case of *Kali Charan v. Abdul Rahman (supra)*. In the *Kali Charan's* case [1918] AIR PC 226, 227, a deed was entered into between the plaintiff and the first defendant on 14 January 1909, whereas the other defendants executed a surety bond on 27 February 1909. In their defence, the defendants contended that the surety bond executed by them was without consideration. But the Privy Council ruled that:

> There was ample consideration for the bond; anything done, or any promise made for the benefit of the principal, may be a sufficient consideration to a surety for giving a guarantee.

Counsel therefore submitted that although the dates of both documents in this case differed, however consideration exists and it is not past consideration because it is clear that the third party indemnity dated 19 December 1986, though executed subsequent to the performance bond dated 9th August 1986, was executed pursuant to the performance bond. Therefore the indemnity by the respondent is valid, and the illustration (c) to s. 80 of the Contracts Act 1950, referred to by the learned Judge in his grounds of judgment is not relevant.

We found in the first place that the difference between a contract of indemnity and a contract of guarantee appears to have been overlooked. A contract of indemnity is defined in s. 77 of our Contracts Act 1950, as "a contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person." A contract of guarantee, according to s. 79 of the Contracts Act 1950:

> is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety"; the person in respect of which default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor".

In a contract of indemnity, the promisor undertakes an original and independent obligation to indemnify, as distinct from a contract of guarantee which is a collateral contract by which the promisor undertakes to answer for the default of another person who is to be primarily liable to the promisee (*Yeoman Credit Ltd. v. Latter* [1961] 1 WLR 828 - 831).

When we examined the copy of the instrument shown on p. 30 of the record of appeal, we found the words "Third Party Indemnity" appearing in the heading of the instrument which is an indication of the intention of the parties to sign a contract of indemnity (*Western Credit Ltd. v. Alberry* [1964] 2 All ER 938 at 940 per Davies LJ). The instrument then reads as follows:

> In consideration of your having at my request given a guarantee to the Perdana Sdn. Bhd. (hereinafter called the contractor) for the sum of Malaysian Ringgit RM371,338.37 guaranteeing the performance of contract by the said contractor in respect of contract No: ... dated ... executed between Syarikat Pembinaan Dan Perumahan Tabung Haji Sdn. Bhd. (hereinafter called the principal) and the said contractor involving the Projek Perumahan Awam, Alor Malai 3 Diatas Lot No.95, 96, 98, 187, 435, 436, 437, 456, 854, 855 Dan Sebahagian Lot 165, Mukim Alor Malai, Kota Setar, Kedah.
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> I, the undersigned, Nasir Ibrahim, hereby undertake to indemnify and hold you harmless against all claims, damages, loss or demands arising out of the said guarantee and the payment by you, if any, under the said guarantee pursuant to a demand made in writing by the principal shall be sufficient to establish my liability to you in that sum or sums as you may have paid to the bank aforesaid.

I further declare and agree that this indemnity shall continue to remain in force and valid,

(a) until your liability under the said guarantee shall cease
(b) notwithstanding any agreement between yourselves, the principal and the said contractor extending the period of liability under the said guarantee.

I also hereby declare and agree that this indemnity shall remain valid and binding as to past and future advances...

Although it is often difficult to determine whether a given instrument is a guarantee or an indemnity, a relevant consideration is that an indemnifier, unlike a surety, is not discharged by the creditor giving time to the principal debtor (*Way v. Hearn* [1862] 11 C.B. (N.S.) 774; 142 ER 1000). In this case, we noticed that the indemnity shall continue to remain in force notwithstanding any agreement to extend the period of liability of the party to be indemnified as a guarantor. We are therefore of the view that the said instrument in this case is a contract of indemnity and not a contract of guarantee so that s. 80 of the Contracts Act 1950, and cases concerning consideration for a guarantee referred to by the learned Judge need not be considered by us.

There remains, however, the question of consideration for the third party indemnity. In the absence of any arguments on this by both Counsel, we do not propose, for the purposes of this appeal, to examine fully the meaning of the expression "consideration" in our Contracts Act 1950. We would however urge that in construing the "consideration" in a contract of indemnity, a Court should be flexible and attempt to give business sense and efficacy to the agreement (*Goldshede v. Swan* [1847] 1 Ex 154). In the present case, there would have been an oral agreement following the request of the respondent to the appellant and the contract of indemnity merely reduced it to writing (*Mumford v. Gething* [1859] 7 CBNS 305). But the learned Judge in his judgment has stated that:

Saya tidak bersetuju dengan pendapat peguam bagi pihak plaintif yang mengatakan perkataan "has done" dalam s. 2(d) Akta Kontrak 1950 itu menunjukkan Akta kita memperakui balasan yang lalu.

We must therefore take a look at s. 2(d) of the Contracts Act 1950, which reads as follows:

2(d) when, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise;

In the present case, both the learned Judge and Counsel have only considered the meaning of the words "has done" in the above-quoted definition and we too, for the purposes of this appeal, would confine ourselves to those words specifically.

The use of the words "has done or abstained from doing" shows that our Contracts Act 1950, recognises the principle laid down in *Lampleigh v. Braithwait* [1615] Hob. 105; Smith LC. 11th Edn. 141. That case was explained by the Privy Council in their recent case of *Pao On v. Lau Yiu Long* [1980] AC 614, 630 in which the plaintiffs as owners of the issued share capital of a private company agreed to sell their shares to the defendants who were the majority shareholders of a public company. No money had passed under the agreement but the price of the shares was to be satisfied by an issue to the plaintiffs of shares in the public company. So as not to depress the market for the public company's shares, the plaintiffs undertook at the defendants' request to retain 60% of the new shares for one year. Later the defendants gave the plaintiffs a guarantee promising to indemnify the plaintiffs against any fall in the value of those shares during the said period.

Subsequently the share prices dropped and the plaintiffs sought to rely on the contract of indemnity. The defendants alleged '*inter alia*' that there was no valid consideration. The Privy Council held '*inter alia*' "that an act done before the giving of a promise could be valid consideration for that promise if the act had been done at the promisor's request, the parties had understood that the act was to be remunerated either by payment or conferment of a benefit and the payment or conferment of a benefit would have been enforceable had it been promised in advance; that since the written guarantee itself referred to the plaintiffs' antecedent promise not to sell the shares before 30 April 1974, it was not possible to treat the defendants' promise of an indemnity as independent of the plaintiffs' antecedent promise made at the defendants' request; and that, therefore, since the guarantee fixed the benefit on the faith of which the plaintiffs' antecedent promise had been given, it stated a valid consideration for the promise of indemnity.

In a judgment delivered by Lord Scarman, the Privy Council said that:

> Mr. Neill's submission is based on *Lampleigh v. Brathwait* [1615] Hobart 105. In that case the Judges said, at p. 106:
>
> > First ... a meer voluntary courtesie will not have a consideration to uphold an assumpsit. But if that courtesie were moved by a suit or request of the party that gives the assumpsit, it will bind, for the promise, though it follows, yet it is not naked, but couples itself with the suit before, and the merits of the party procured by that suit, which is the difference.
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> The modern statement of the law is in the judgment of Bowen LJ in *In re Casey's Patents* [1892] 1 Ch. 104, 115-116; Bowen LJ said:
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> > Even if it were true, as some scientific students of law believe, that a past service cannot support a future promise, you must look at the document and see if the promise cannot receive a proper effect in some other way. Now, the fact of a past service raises an implication that at the time it was rendered it was to be paid for, and, if it was a service which was to be paid for, when you get in the subsequent document a promise to pay, that promise may be treated either as an admission which evidences or as a positive bargain which fixes the amount of that reasonable remuneration on the faith of which the service was originally rendered. So that here for past services there is ample justification for the promise to give the third share.
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> Conferring a benefit is, of course, an equivalent to payment: see *Chitty on Contracts*, 24th Edn. (1977) Vol. 1, para. 154.

We are aware that the *Pao On* case [1980] AC 614, 630 originated in Hong Kong where, as far as we know, there is no statute similar to our Contracts Act 1950. In our case, we are of the view that the essence of consideration is that the promisee, that is the appellant, has taken upon itself some kind of burden or detriment, that is the giving of a guarantee for the purpose of the performance of a contract by a contractor called "Perdana Sdn. Bhd.". In another words, the promisee in this case, that is the appellant, to its detriment has undertaken a legal responsibility. Its performance, which constitutes a consideration, is positive in that the appellant, as promisee, has done something, that is the giving of a guarantee to Perdana Sdn. Bhd. at the request of the promisor, that is the respondent. The detriment undertaken by the promisee, the appellant, in this case is a past performance and should be sufficient consideration where there is a promise in consideration of some act previously done by the promisee at the request of the promisor. In deciding whether consideration is past, the Court should not take a strictly chronological view. If the consideration and the promise are substantially one transaction, as in this case, it should not matter in what order they are

given. In other words, consideration itself accommodates past consideration so long as the "desire" requirement is specified, that is the guarantee was given at the **request** of the indemnifier. As it can be proved that there was consideration, it can also be proved that the third party indemnity was valid.

For the reasons given, we would therefore allow the appeal with costs here and below, set aside the order of the learned Judge and restore the order of the Senior Assistant Registrar dated 23 November 1990, dismissing the application of the respondent to strike out the appellant's writ of summons and statement of claim under O. 18 and l9(1)(b), (c) and (d) of the Rules of the High Court 1980. The deposit is also to be returned to the appellant.

Also found at [1992] 4 CLJ 1801